

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DONALD GREEN,

Petitioner,

v.
STATE OF CALIFORNIA BOARD OF
PAROLE HEARINGS,

Respondent.

Civil No. 10-2516 JLS (JMA)

**ORDER DENYING IN FORMA
PAUPERIS APPLICATION AND
DISMISSING CASE WITHOUT
PREJUDICE**

Petitioner, a state prisoner proceeding pro se has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

APPLICATION TO PROCEED IN FORMA PAUPERIS

Petitioner has not paid the \$5.00 filing fee and has filed a request to proceed in forma pauperis which reflects a \$21.31 balance in his prison trust account. The filing fee associated with this type of action is \$5.00. See 28 U.S.C. § 1914(a). It appears Petitioner can pay the requisite filing fee. Accordingly, the Request to Proceed In Forma Pauperis is **DENIED**.

FAILURE TO NAME PROPER RESPONDENT

Review of the Petition reveals that Petitioner has failed to name a proper respondent. On federal habeas, a state prisoner must name the state officer having custody of him as the respondent. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28

1 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction when a habeas petition fails to
 2 name a proper respondent. See id.

3 The warden is the typical respondent. However, “the rules following section 2254 do not
 4 specify the warden.” Id. “[T]he ‘state officer having custody’ may be ‘either the warden of the
 5 institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal
 6 institutions.’” Id. (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a
 7 petitioner is in custody due to the state action he is challenging, ‘[t]he named respondent shall
 8 be the state officer who has official custody of the petitioner (for example, the warden of the
 9 prison).’” Id. (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note).

10 A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of]
 11 habeas corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The
 12 actual person who is [the] custodian [of the petitioner] must be the respondent.” Ashley v.
 13 Washington, 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of
 14 habeas corpus acts upon the custodian of the state prisoner, the person who will produce “the
 15 body” if directed to do so by the Court. “Both the warden of a California prison and the Director
 16 of Corrections for California have the power to produce the prisoner.” Ortiz-Sandoval, 81 F.3d
 17 at 895.

18 Here, Petitioner has incorrectly named “The State of California Board of Parole
 19 Hearings,” as Respondent. In order for this Court to entertain the Petition filed in this action,
 20 Petitioner must name the warden in charge of the state correctional facility in which Petitioner
 21 is presently confined or the Director of the California Department of Corrections. Brittingham
 22 v. United States, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

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CONCLUSION AND ORDER

2 In light of the above, the Court **DENIES** the request to proceed in forma pauperis, and
3 **DISMISSES** the case without prejudice. To have the case reopened, Petitioner may submit a
4 copy of this order along with the requisite fee AND a First Amended Petition which cures the
5 pleading deficiencies noted above **no later than February 22, 2011**. *The Clerk of Court is*
6 *directed to send Petitioner a blank First Amended Petition form.*

IT IS SO ORDERED.

DATED: December 20, 2010

Janis L. Sammartino
Honorable Janis L. Sammartino
United States District Judge